In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 620

BOEING AIRPLANE COMPANY, PETITIONER

v.

ARTHUR E. PERRY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES W. SULLIVAN, DECEASED; AND COLENE SULLIVAN, AS WIDOW OF JAMES W. SULLIVAN, DECEASED; AND CYNTHIA LYNN SULLIVAN, A MINOR, BY AND THROUGH COLENE SULLIVAN, HER MOTHER, AS NATURAL GUARDIAN AND NEXT FRIEND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The relevant facts are set forth in the petition and in the opinion of the court of appeals (Pet., App. A) and may be summarized briefly for purposes of this memorandum. The late Captain Sullivan, a member of the United States Air Force, was killed in the crash of a Boeing B–47 bomber. Thereafter, a wrongful death action was instituted against Boeing, the manufacturer of the plane, in the name of the special administrator of the decedent's estate. Concededly,

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this was in strict accordance with a Nebraska statute (Pet. 5–6) providing that such a suit shall be brought by and in the name of personal representatives of the decedent. By reason of diversity, the action was filed in the United States District Court.

When the suit was commenced, Captain Sullivan's widow, for whose benefit it was brought, was receiving payment under the Federal Employees' Compensation Act, 5 U.S.C. 751. Subsequently, the United States, pursuant to the same Act (5 U.S.C. 776, Pet. 4–5), required Mrs. Sullivan to assign her right, title and interest in the wrongful death claim to the United States.[1] Petitioner's sole contention is that, once the assignment was made, the action pending in the district court could no longer be prosecuted without the substitution or intervention of the United States. It argues in this connection that the purpose of 5 U.S.C. 776 is to confer the right of action upon the United States and that the government must therefore enter the litigation as the real party in interest.

We note at the outset that there is no conflict in this case between the United States and the special administrator. The United States has no objection to the former's continued representation of all beneficial interests involved. We point out additionally that petitioner makes no claim that it is prejudiced by the fact that the United States has failed to intervene. The consideration that the United States has an interest in the recovery, if any, does not affect Boeing's

[1] Under this provision, the beneficiary ultimately receives any amount which exceeds the compensation paid under the Federal Employees' Compensation Act.

ability to defend the charge of negligence in the same way that it would if the widow had the sole interest in the potential recovery.

Petitioner suggests, however, that the government's interests are not fully protected by the administrator. But surely the question whether the interests of the United States will be adequately protected without its active participation in the litigation is one for the government to decide, assuming that there is no legal obstacle to continuation of the suit in its present form. We have been advised by the Department of Labor that "The present case is being handled in the same manner as virtually every case has been handled since the enactment of the Federal Employees' Compensation Act in 1916. That is, the claim is being prosecuted by private attorneys in the name of the person entitled under the applicable substantive law, with the understanding that the United States is entitled to refund from any portion of the recovery which may be eventually realized by each compensation beneficiary as provided by Section 27 of the Act." In short, experience has convinced the United States that the administration of the Act is well served by the course it is pursuing.

We perceive no legal obstacle to continuation of the suit in its present form. Rule 17(a) of the Federal Rules of Civil Procedure provides, to be sure, that "Every action shall be prosecuted in the name of the real party in interest." It adds, however, that an executor or administrator "may sue in his own name without joining with him the party for whose benefit the action is brought." There is nothing in the Fed-

eral Employees' Compensation Act which appears to override this provision.

So far as the capacity of the administrator is concerned, Rule 17(b) declares that this "shall be determined by the law of the state in which the district court is held." Petitioner makes no claim that state law has been misinterpreted, and it would appear in any event that there is no reason for this Court to review the issue of state law involved.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

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